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ALEXANDER L. STEVAS,
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No. 84-1251

In the Supreme Court of the United States

October Term, 1984

THE STATE OF OHIO,
Petitioner,

vs.

KATHERINE LUCK,
Respondent.

On Petition for a Writ of Certiorari
To the Ohio Supreme Court

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a defendant's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and Article I, Section 16 of the Ohio Constitution are violated if a defendant's ability to receive a fair trial is prejudiced as a result of an unjustifiable delay between the date of the commission of the offense and the commencement of prosecution during which time actual prejudice to the defendant occurs.

2. Whether a defendant in a criminal prosecution is deprived of the right of the assistance of counsel in violation of the Sixth Amendment to the United States Constitution when a police officer elicits statements from the defendant after:

(1) refusing to allow an attorney retained pursuant to the defendant's request, to speak to the defendant on the telephone;

(2) failing to inform the defendant either of the retention or of the attorney's telephone calls to the police station on her behalf; and

(3) assuring the defendant's attorney that the police will not talk to or interrogate the defendant.

3. Whether this Court should grant a petition for a writ of certiorari to review a criminal case which was dismissed based on principles of state constitutional law as well as federal constitutional law.

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OPINIONS BELOW

The opinion of the Ohio Supreme Court is reported at 15 Ohio St. 3d 150 and is printed in the appendix to the petition at A1. The opinion of the Court of Appeals for the Eighth Appellate District, Cuyahoga County, Ohio is unreported, but is printed in the appendix to the petition at p. A17. The order and opinion of the Cuyahoga County Court of Common Pleas is unreported, but is printed beginning at p. A36 of the appendix to the petition.

JURISDICTION

This Court has discretionary jurisdiction pursuant to 28 U.S.C. 1257(3).

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 5

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment 6

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Amendment 14

Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein

they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF FACTS AND HISTORY OF THE CASE

On March 15, 1983, fifteen years, four months and twelve days after Helen Tietjen was killed in Lakewood, Ohio, the respondent was secretly indicted and charged with her murder. The following evening, the respondent was arrested and taken to the Lakewood Police Department where she was denied the opportunity to speak with an attorney who had been retained to represent her. While the respondent was being "processed", a policeman deliberately elicited incriminating statements from the respondent concerning Mrs. Tietjen's death.

The trial court granted the respondent's motion to dismiss the indictment because the respondent had been prejudiced in her ability to receive a fair trial as a result of the events that occurred during an unjustifiable fifteen year delay between the date of the offense and the commencement of prosecution. The trial court also granted the respondent's motion to suppress her post-indictment statements on the grounds that the statements had been taken in violation of the respondent's Sixth Amendment right to the assistance of counsel.

The courts below made the following findings of fact:

1. That there was no justification for the delay between the date of the offense and the commence-

ment of prosecution. Although the respondent was one of several suspects who was investigated and interviewed in 1967 and 1968, the police investigation ended in 1968 and no additional evidence of any substance was discovered between that time and the time of the indictment.

2. That the defendant was prejudiced as a result of the unjustifiable delay in that: (1) the deaths of two key witnesses; (2) the fading of memories and the changes of appearances; and (3) the loss of evidence including the destruction of tape recordings made in 1967 and 1968 of potential witnesses and suspects.

3. That the respondent's post-indictment statements to the police were inadmissible as a result of the respondent being denied the assistance of counsel, and as such, the respondent's statement did not constitute new evidence which would justify the prosecution after the fifteen-year delay.

The Ohio Supreme Court succinctly summarized the events which occurred after the respondent's arrest and during the time that her statements were given to the police at pages A3-A5 of the appendix to the petition which reads as follows:

> The police report indicates that while speaking to her husband and later, while being transported to the Lakewood Police Station, Mrs. Luck became physically ill and vomited. Upon her arrival at the police station, Mrs. Luck provided Patrolman Murray of the Lakewood Police Department with basic information for her "booking record," and she signed both an "Advice of Rights-Adult" and "Waiver of Rights."

This "booking procedure" began at approximately 7:10 p.m. and was completed by about 7:30 p.m. Mrs. Luck was then placed in a cell to await further "processing."

At 8:13 p.m., attorney Michael Duff, who had been retained by Mr. Luck, telephoned the Lakewood Police Department. The record reveals that this call lasted for one minute, with subsequent calls occurring as follows: (1) 8:14 p.m.—five minutes, (2) 8:37 p.m.—three minutes, (3) 8:41 p.m.—three minutes, and (4) 10:22 p.m.—two minutes. Apparently, in all but the 8:13 p.m. call, Duff spoke with Detective Holmok. Duff informed Holmok that he was representing Mrs. Luck, and he asked to speak to her. Holmok refused this request on the ground that Luck was "in lock-up" and could not come to the phone. Duff asked Holmok if Mrs. Luck had made any statement, and Holmok said that she had not. Duff also asked the detective to not question Mrs. Luck, and he requested that Mrs. Luck be informed that he had been retained as her lawyer by Mr. Luck. Holmok indicated that Mrs. Luck had not been questioned and he assured Duff that he had no intention of talking to Mrs. Luck.

At approximately the same time that Duff first called the Lakewood Police Station, Holmok began "processing" Mrs. Luck by taking her fingerprints and obtaining a handwriting sample. After "processing," at approximately 9:00 p.m., Mrs. Luck apparently expressed a desire to talk to Holmok; and, after signing both an "Interrogation: Advise [*sic*] of Rights" and "Waiver of Rights," Mrs. Luck began discussing how she came to know Helen Tietjen. At one point Mrs. Luck asked Holmok if he knew what the events were that had led up to Tietjen's death. Holmok said that he thought he knew what had happened, and that he

would write his theory down on a paper and then see if his theory "agreed" with that of Mrs. Luck.

The "conversation" between Mrs. Luck and Holmok continued for approximately five hours, with Holmok at one point drawing a picture of two roads—one of which was a path whereon he could offer her help, the other a path where he could provide no help. Holmok agreed at the hearing on defendant's motion to dismiss that this demonstration was to encourage Mrs. Luck to unburden herself. At no time in this five-hour period did Holmok inform Mrs. Luck that her husband had retained an attorney for her; and, it was not until she had described her role in the death of Tietjen and given what amounted to a full confession that Mrs. Luck called her husband and learned that Duff had been retained as her lawyer. (A3-A5)

Based upon the findings of fact and conclusions of law as outlined above, the Ohio Court of Appeals and the Ohio Supreme Court both unanimously affirmed the judgment of the trial court.

REASONS FOR DENIAL OF THE WRIT

The petition for a writ of certiorari manifests great unhappiness with the judgments of the three courts below, but fails to present any substantial legal issue for this Court's determination and fails to demonstrate any conflict with the decisions of this Court.

The argument that follows reveals that the real source of the petitioner's frustration is the trial court's findings of fact which were adopted by the Ohio Court of Appeals and the Ohio Supreme Court. The judgments of the trial courts inexorably flow from those findings of fact. This Court does not exist for the purpose of reviewing findings of fact or giving losing litigants another hearing, particularly under circumstances in which the outcome will have no effect on any one other than the parties in the case. While respondent can demonstrate (and did demonstrate to the courts below) that the findings of fact in question were clearly correct and abundantly supported by the evidence, such an issue does not warrant this Court's exercise of its discretionary jurisdiction.

ARGUMENT

I. THE OHIO COURTS CORRECTLY HELD THAT A DEFENDANT'S RIGHT TO DUE PROCESS OF LAW UNDER THE FIFTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE OHIO CONSTITUTION ARE VIOLATED IF A DEFENDANT'S ABILITY TO RECEIVE A FAIR TRIAL IS PREJUDICED AS A RESULT OF AN UNJUSTIFIABLE DELAY BETWEEN THE DATE OF THE COMMISSION OF THE OFFENSE AND THE COMMENCEMENT OF PROSECUTION DURING WHICH TIME ACTUAL PREJUDICE TO THE DEFENDANT OCCURS.

The issue is whether the fifteen year delay in the commencement of prosecution caused actual prejudice to the respondent and was unjustified. The rule is that when pre-indictment delay results in actual prejudice to a defendant, there is a due process claim which is "ripe for adjudication". *U.S. v. Marion* (1971), 404 U.S. 307, 324, and *U.S. v. Lovasco* (1977), 431 U.S. 783, 789. In addition, proof of actual prejudice must be viewed in light of the State's reason for the delay and weighted against the evidence which would be admissible against the accused at trial. *U.S. v. Lovasco, supra,* at 789-790, and *U.S. v. MacDonald* (1982), 456 U.S. 1.

In the present case, the courts below found that the respondent had suffered actual prejudice as the result of:

(1) The deaths of two key witnesses, Larry Cassano and Dr. Catalano. Catalano allegedly treated

Luck for an injury to her hand on or around October 30, 1967. Cassano was an acquaintance of the defendant and an original suspect in the Tietjen murder case, who, according to Luck's confession to Holmok on the night of her arrest, was present at Tietjen's apartment at the time that she was killed.

(2) The fading of memories and changes in appearance. Specifically, a taxi driver who identified the defendant in 1967 (from a 1962 photograph) as having been a passenger in his cab on October 30, 1967, is no longer able to identify the person who rode in his cab.

(3) The loss of evidence. All of the tape recorded interviews with potential witnesses and suspects that were compiled by the Lakewood Police Department in 1967-1968 have been destroyed. Transcripts of these interviews do not exist. (A7-A8)

The courts below went on to find that the State's reason for the pre-indictment delay was unjustified and that the other admissible evidence against the respondent failed to outweigh the actual prejudice which the respondent had suffered during the delay. The courts below found that the "police negligence" in failing to have the case reviewed by the county prosecutor's office was an unjustifiable basis for the delay and that the State's evidence had diminished during the fifteen year delay as a result of the death of witnesses, the loss of taped interviews and the fading of memories.

Moreover, the courts below found that the respondent's post-indictment statements were inadmissible because they were obtained in violation of her Sixth Amendment right to the assistance of counsel. Accordingly, the respondent's statements could not be viewed as newly discovered evi-

dence which would override the prejudicial impact of the pre-indictment delay. The Ohio Supreme Court concluded its discussion concerning the inadmissibility of the respondent's statements by saying:

> As set forth in the facts of this case, above, defendant Luck, immediately after her arrest, requested her husband to contact an attorney on her behalf. Holmok, who was one of the arresting officers, was well aware of Mrs. Luck's request when he later accepted Duff's phone calls at the Lakewood Police Station. Holmok told Duff that he could not speak to Mrs. Luck on the phone; and, despite his knowledge of Luck's desire to retain counsel, Holmok deliberately elicited incriminating statements from Luck without telling her that her husband had retained Duff as her attorney.[1] This behavior, when coupled with Holmok's assurances to Duff that he would not talk to or interrogate Mrs. Luck, amounts to active deception that is clearly violative of Luck's right to counsel. (A9)

The Ohio Supreme Court went on to find that there was no justification for the delay in the commencement of prosecution and said:

> Having found actual prejudice to the defendant, we turn to the second part of the test set forth in *United States v. Lovasco, supra,* which requires that there be no justifiable reason for the delay in prosecution that caused this prejudice. On this point, the state contends that it appears that there was, in 1967, at least a police error in judgment as to whether this case should have been submitted to the prosecutor's office. Following this alleged "error in judgment," the Lakewood Police Department ceased its active investigation into Tiejen's death. Fifteen years

later, the prosecutor sought an indictment based upon the same evidence that had been available in 1968.[6] In fact, the deaths of witnesses and the loss of taped interviews had significantly *reduced* the available evidence by the time that the prosecutor sought the indictment of Mrs. Luck.

This court will not assume the role of the prosecutor to determine when there is sufficient evidence to seek an indictment in every case; and we agree with the rationale of *United States v. Lovasco, supra,* at 792, that it would be unwise to adopt a rule requiring the commencement of prosecution whenever there is "sufficient evidence to prove guilt beyond a reasonable doubt." We believe, however, that a delay in the commencement of prosecution can be found to be unjustifiable when the state's reason for the delay is to intentionally gain a tactical advantage over the defendant, see *United States v. Marion, supra,* or when the state, through negligence or error in judgment, effectively ceases the active investigation of a case, but later decides to commence prosecution upon the same evidence that was available to it at the time that its active investigation was ceased. The length of delay will normally be the key factor in determining whether a delay caused by negligence or error in judgment is justifiable. (A14-A15)

Accordingly, the Ohio Supreme Court concluded that:

The delay in the commencement of prosecution against Katherine Luck "violates those 'fundamental conceptions of justice which lie at the base of our civil and political institutions,' * * * and which define 'the community's sense of fair play and decency.' * * *" *United States v. Lovasco, supra,* at 790 (citations omit-

ted). We find that this delay is unjustifiable, has resulted in actual prejudice to the defendant, and will effectively deprive the defendant of her right to due process of law under Section 16, Article I of the Ohio Constitution and the Fifth and Fourteenth Amendments to the United States Constitution should this case proceed to trial. (A16)

The Ohio Courts correctly applied due process standards which have been defined by this court. Their judgments should be affirmed.

II. THE OHIO COURTS CORRECTLY HELD THAT A DEFENDANT IN A CRIMINAL PROSECUTION IS DEPRIVED OF THE RIGHT OF THE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH AMENDMENT TO THE UNITED STATES CONSTITUTION WHEN A POLICE OFFICER ELICITS STATEMENTS FROM THE DEFENDANT AFTER:

(1) REFUSING TO ALLOW AN ATTORNEY RETAINED PURSUANT TO THE DEFENDANT'S REQUEST, TO SPEAK TO THE DEFENDANT ON THE TELEPHONE;

(2) FAILING TO INFORM THE DEFENDANT EITHER OF THE RETENTION OR OF THE ATTORNEY'S TELEPHONE CALLS TO THE POLICE STATION ON HER BEHALF; AND

(3) ASSURING THE DEFENDANT'S ATTORNEY THAT THE POLICE WILL NOT TALK TO OR INTERROGATE THE DEFENDANT.

The second issue raised by the petitioner is whether the respondent's post-indictment statements were obtained in violation of her Sixth Amendment right to the assistance

of counsel. The State argues that the respondent volunteered the statements after knowingly, intelligently, and voluntarily waiving her right to the assistance of counsel. The courts did not agree with the petitioner's argument. The Ohio Supreme Court addressed this issue in its decision and said:

> The state argues, in effect, that Holmok's conduct is not relevant to the admissibility of the statements in question because Luck waived her right to counsel both during her "booking" and immediately after her "processing." This argument is without merit. The review required by *Johnson v. Zerbst* (1938), 304 U.S. 458, 464, of "the particular facts and circumstances surrounding * * * [the] case, including the background, experience, and conduct of the accused," reveals that the state has failed to carry its burden of proving that the defendant "knowingly and intelligently" waived her right to counsel. See *Brewer v. Williams* (1977), 430 U.S. 387, at 402-405. (A9-A10)

In its decision, the Ohio Supreme Court included verbatim quotations from the tape recordings made when the respondent signed the first "waiver of rights form" at the time of her booking. (A10-A12) After analyzing the conversation between the respondent and the police officers at the time this waiver form was signed and analyzing the events that occurred thereafter, the Ohio Supreme Court concluded that:

> Mrs. Luck apparently then signed the "Waiver" form and the booking procedure continued. This signature, however, cannot reasonably be construed as a "knowing and intelligent waiver" of her right to counsel. Mrs. Luck was feeling ill and apparently was highly agitated by the events of the previous hour.

Murray's explanation of the import of the "Waiver" form is clearly inadequate, and Mrs. Luck's hesitation in signing the waiver was apparently eased only after Murray advised her that "we're not going to talk to you here anyway. It's just a formality."

Based on the foregoing, it is indisputable that Luck did not knowingly and intelligently waive her right to counsel prior to the first four calls by Duff to the Lakewood Police Station. For this reason, we need not consider whether Mrs. Luck's second "waiver," which occurred at 9:05 p.m. (after Duff's fourth call but before his fifth and final call), was knowingly and intelligently made. We note, however, that Mrs. Luck was kept "in the dark" as to Duff's calls on her behalf. These calls were placed in response to Mrs. Luck's request for counsel, as made through her husband, and it is highly unlikely that *any* waiver made subsequent to the receipt of these calls by the Lakewood Police Department could be considered to be knowing and intelligent. See *Commonwealth v. McKenna* (1969), 355 Mass. 313, 244 N.E.2d 560. (A12-A13)

The Ohio courts correctly applied the standards established by this court for determining if a post-indictment statement was obtained as a result of a suspect being denied the right to the assistance of counsel. The judgments of the courts below should not be disturbed.

III. THE OHIO COURTS CORRECTLY HELD THAT A COURT SHOULD GRANT A PETITION FOR A WRIT OF CERTIORARI TO REVIEW A CRIMINAL CASE WHICH WAS DISMISSED BASED ON PRINCIPLES OF STATE CONSTITUTIONAL LAW AS WELL AS FEDERAL CONSTITUTIONAL LAW.

This court should not grant a petition for a writ of certiorari in this case because the indictment was dismissed based on State constitutional law as well as federal constitutional law.

In the present case, the Ohio Supreme Court held in the second syllabi of its decision that the indictment must be dismissed based on the violation of the respondent's right to due process under Section 16, Article I of the Ohio Constitution as well as a violation of the due process clauses of the Fifth and Fourteenth Amendments to the United States Constitution. Even if this court were to find that the federal constitutional component of the Ohio Supreme Court's decision was incorrect, the judgment of the Ohio Supreme Court would be unaffected as a result of the court's finding that dismissal of the indictment was maintained pursuant to a provision of the Ohio Constitution. As recent as November 26, 1984, this court denied an application for a writ of certiorari in a case where the Ohio Supreme Court had determined that evidence gathered against an accused probation violator must be suppressed pursuant to Article I, Section 14 of the Ohio Constitution. *State v. Burkholder* (1984), 12 Ohio St. 3d 205, 466 N.E.2d 176, *cert. denied* (Nov. 26, 1984), ... U.S. ....., 53 U.S.L.W. 3404.

In the present case, the petitioner's application for a writ of certiorari is without merit because the decisions

of the courts below were not based exclusively on disputed principles of federal constitutional law. Accordingly, this court should deny the petitioner's application for writ of certiorari.

CONCLUSION

The petition for writ of certiorari should be denied because the petitioner is simply seeking yet another hearing concerning factual questions which have been decided by the courts below. The petition does not raise questions which this court has not decided on previous occasions. Accordingly, the respondent submits that the petition should be denied.

Respectfully submitted,

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